BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KATHY POLK	)	
Claimant	)	
VS.	)	
	)	Docket No. 201,056
CESSNA AIRCRAFT COMPANY	)	
Respondent	)	
AND	)	
	)	
AETNA CASUALTY & SURETY COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appeals from the Award of Administrative Law Judge John D. Clark dated September 7, 1999. The Administrative Law Judge limited claimant to medical expenses only, applying K.S.A. 44-501(c), as interpreted by Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996). Oral argument was held January 14, 2000.

APPEARANCES

Claimant appeared by her attorney, Tamara Jo Collins of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Edward D. Heath, Jr., of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board.

ISSUES

(1) What is the date of claimant's repetitive trauma injury?

(2) What is the nature and extent of claimant's disability?

(3) Does K.S.A. 44-501(c), as interpreted by Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996), apply to this case, thus limiting claimant to medical benefits only?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant had been employed by respondent for over eight years as a certified sealer and sheet metal assembler. Claimant's job duties required that she work on a regular basis with heavy panels and heavy pieces of equipment, including huck guns, drills and a Winslow machine.

Claimant first began experiencing problems in her right wrist and right upper extremity in April 1993. Claimant primarily used her right hand when she built the panel. Claimant began receiving treatment with Dr. Rhodes and Dr. Cruz. Claimant testified she was restricted from heavy lifting at that time, but continued performing her regular job. Claimant was later referred to Jay Stanley Jones, M.D., who restricted claimant from using the Winslow machine or the rivet gun and recommended against any heavy lifting. Claimant testified that these restrictions were not honored by respondent and she continued performing her regular job. Claimant was also treated by Dr. Wilkinson, the company doctor, who saw her at respondent's plant.

In April 1995, claimant was referred to Robert L. Eyster, M.D., a board certified orthopedic surgeon. Dr. Eyster continued treating her until January 1997. Claimant's complaints, when she first saw Dr. Eyster, included the right upper extremity, the right shoulder and the right side of her neck, although there were occasional pain complaints on the left side of her neck and into the left shoulder.

Dr. Eyster examined claimant, finding no neurological deficits. He treated her conservatively and provided work restrictions of "no lifting of the wind slope [sic]" machine, no lifting of guns and/or repetitive squeezing.

At some time during claimant's employment, respondent began accommodating claimant, although the accommodations were relatively minor. The accommodations

included providing counterbalances for the Winslow machine, the rivet guns and the other heavy pieces of equipment claimant's job required. These counterbalances reduced the amount of lifting involved in claimant's job. Respondent also provided claimant occasional assistance in lifting some of the heavier panels. The record unfortunately is clouded as to when these accommodations were actually provided by respondent.

With the exception of the counterbalances and some minor assistance in lifting, claimant's job tasks remained the same.

Dr. Eyster's examination of claimant uncovered no objective findings to justify claimant's complaints. Claimant's range of motion was normal, as were all neurological tests. Claimant underwent an MRI of the cervical spine in 1997, which indicated there could be a slight chance of a small disc protrusion in the cervical spine. Claimant then underwent a myelogram and post-myelogram CT scan, which displayed no evidence of disc rupture or nerve root compression in the cervical spine.

Dr. Eyster assessed claimant a 3 percent impairment to the body as a whole due to her neck and trapezius muscle complaints. This rating was based upon claimant's subjective complaints, with little or no objective basis upon which to rate claimant.

Dr. Eyster's February 7, 1997, letter to claimant's attorney verified the 3 percent impairment to the body as a whole, but stated that the impairment "continues." There is no indication in the record when Dr. Eyster first assessed claimant this 3 percent functional impairment. Claimant continued working her regular job with respondent, although she testified she was in pain.

Claimant was referred to Daniel D. Zimmerman, M.D., for an independent medical examination at the request of claimant's attorney. Dr. Zimmerman examined claimant on February 9, 1996. Dr. Zimmerman assessed claimant a 14 percent impairment to the body as a whole pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), which would equal a 13 percent impairment based upon the AMA Guides, Fourth Edition. This second impairment was calculated by using the range of motion section in the AMA Guides, Fourth Edition. Dr. Zimmerman was asked, on cross-examination, if he were to use the diagnosis related estimate (DRE), what claimant's impairment would be. He acknowledged claimant would only have a 5 percent functional impairment utilizing the DRE.

Dr. Zimmerman's analysis included the cervical x-rays taken of claimant, which showed no foraminal encroachment. The plain film x-rays he read as being normal. During his examination, he found claimant to have no muscle spasms in the cervical spine, with full range of motion in the shoulders, elbows, wrists, fingers and thumb. He also found normal muscle strength at all those levels. Dr. Zimmerman testified that claimant did not

have a herniated nucleus pulposus as had been indicated on the MRI, but that she does have degenerative changes. He was unable to confirm his source for these degenerative changes, as the plain film x-rays showed no degenerative changes.

Claimant was last treated by Dr. Eyster in January 1997. She was last examined by Dr. Zimmerman in February 1996. With the exception of occasional visits to the company nurse, claimant does not appear to have been treated by any doctor during the last year she worked for respondent. Claimant does reference treatment with J. Mark Melhorn, M.D., a local hand surgeon, but Dr. Melhorn's records are not included in the record and claimant does not testify as to when she saw Dr. Melhorn.

Claimant continued working her regular job with respondent, utilizing the counterbalanced hoists to lift heavy machines, until June 11, 1998, at which time she was terminated. Prior to termination, claimant was involved in several altercations with her coworkers and her supervisors. Claimant was suspended on two separate occasions by respondent. The first suspension involved claimant's clocking out from respondent's plant, unauthorized, and leaving the plant for personal business. The second suspension involved an altercation between claimant, who is African-American, and a white coworker. Claimant and the coworker entered into an argument, at which time both used abusive language to each other. Both claimant and the coworker were suspended at that time.

After the second suspension, claimant entered into an agreement with respondent, acknowledging that, if claimant was involved in any more misconduct, she would be subject to immediate termination. This agreement, entered into between claimant, respondent and claimant's union, was formalized in a document signed by claimant, the union representative and the company representative on May 1, 1998, titled "Letter of Agreement." After this agreement was finalized, claimant continued performing her regular duties with respondent. However, between the date of the agreement and claimant's termination, claimant was involved in several additional incidents involving her coworkers and her supervisors. These incidents included arguments between claimant and her coworkers, the use of vulgar language by claimant in reference to her coworkers and supervisors, altercations between claimant and her supervisor about claimant's standing at the time clock and allegations by claimant that she was being discriminated against because she was African-American.

In June 1998, at a meeting regarding the dress code policy, claimant had an argument with her supervisor during which she used vulgarity, calling her supervisor several names. After this meeting, claimant was suspended and ultimately terminated from her employment with respondent.

CONCLUSIONS OF LAW

In proceedings under the Workers Compensation Act, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence. K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

An issue critical to the arguments of both claimant and respondent is the appropriate date of accident in this matter. Claimant's E-1, filed in April 1995, alleges a series of accidents beginning April 19, 1993, with aggravation each and every working day thereafter. However, at regular hearing, the parties stipulated to a date of accident of April 19, 1993. Respondent argues claimant is bound by this stipulation. While claimant's attorney did enter into that stipulation at the time of the regular hearing, it is noted that the E-1 and the E-3's filed with the Division of Workers Compensation show April 19, 1993, and a series thereafter. Claimant's Motion to Amend Stipulation with regard to the date of accident was filed with the Division on August 23, 1999. In the Award, the Administrative Law Judge showed April 19, 1993, and each and every day thereafter as the stipulated date of accident. K.A.R. 51-3-8(e) allows the administrative law judge to decide whether stipulations may be withdrawn in workers' compensation litigation. In this instance, the record is in conflict regarding whether claimant stipulated to a specific accident date of April 19, 1993, or whether claimant intended to claim a series of accidents through her last day worked. Regardless, the Administrative Law Judge appears to have granted claimant's Motion to Amend Stipulation regarding the date of accident. The Appeals Board affirms this decision, finding claimant is not bound by the stipulation of an April 19, 1993, date of accident.

Having so ruled, the Appeals Board must next consider claimant's date of accident. Utilizing the logic and reasoning of what has become a long list of appellate court cases dealing with dates of accident in Kansas, the most recent being Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999), the Board finds the date of accident to be June 11, 1998.

In Treaster, the Kansas Supreme Court entered into a detailed analysis regarding dates of accident in workers' compensation litigation in Kansas. Ultimately, the Court approved the logic, reasoning and results of Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), Durham v. Cessna Aircraft Company, 24 Kan. App. 2d 334, 945 P.2d 8 (1997), and Anderson v. The Boeing Company, 25 Kan. App. 2d 220, 960 P.2d 768 (1998). In Anderson, the Kansas Court of Appeals applied the Berry rule, finding that the date of accident or occurrence is the last day the claimant performed

services for his or her employer and is required to stop working as a direct result of his or her pain and disability resulting from that claimant's carpal tunnel syndrome. The Kansas Supreme Court did not limit the Berry holdings to situations where a claimant is forced to discontinue his or her employment for medical reasons either. The Supreme Court found that, if an accommodated position, that is not substantially the same as the previous position that claimant occupied, is offered and accepted, the Berry rule should be applied. The date of accident or occurrence will be the last day the claimant performed the earlier work tasks.

In this instance, while claimant was accommodated to a certain degree, the Appeals Board cannot find that the accommodation was substantial so as to control claimant's date of accident. Claimant continued working the same job during her employment with respondent through her last day worked, June 11, 1998. The Appeals Board, therefore, finds, based upon the Supreme Court's reasoning in Treaster, that claimant suffered accidental injury through a series of accidents beginning April 19, 1993, and continuing through her last date of employment, June 11, 1998.

Respondent raised, as an objection to claimant's entitlement to benefits, K.S.A. 44-501(c), as interpreted by the case of Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996). However, K.S.A. 44-501(c) was modified by the Kansas legislature effective April 4, 1996. Accidents occurring after that date are no longer limited by the Boucher language. Therefore, by finding claimant's accident date to extend through her last day worked, the Appeals Board must also find that K.S.A. 44-501(c), as interpreted by Boucher, does not apply herein.

With regard to the nature and extent of claimant's injury, the Appeals Board must consider the conflicting opinions of Dr. Eyster, claimant's treating physician, and Dr. Zimmerman, claimant's evaluating physician. Dr. Eyster found very little upon which to base a functional impairment, assessing claimant a 3 percent whole person functional impairment, based upon claimant's subjective complaints only. Tests, including x-rays, MRIs, myelograms and CT scans, all proved basically normal. In addition, during his nearly two years of treatment for claimant's condition, Dr. Eyster found claimant's condition to be normal, with normal ranges of motion, normal muscle strength and normal functioning of claimant's right upper extremity, shoulder and neck.

Dr. Zimmerman, in assessing claimant a 14 percent impairment to the body as a whole, acknowledged using the AMA Guides, Fourth Edition, range of motion section. However, the AMA Guides, when discussing the range of motion evaluation versus the DRE method of evaluation, recommends that the range of motion model be used only if the DRE, or injury model, is not applicable. Dr. Zimmerman acknowledged, in using the DRE, claimant has a 5 percent impairment to the body as a whole.

The Appeals Board also notes that Dr. Zimmerman examined claimant on one occasion only, in February 1996. Dr. Eyster, on the other hand, treated claimant for almost two years, continuing his treatment through January 1997. Dr. Eyster also had the opportunity to review certain diagnostic tests, which were not available to Dr. Zimmerman at the time of his evaluation. The Appeals Board finds that Dr. Eyster's analysis of claimant, assessing her a 3 percent whole body functional impairment, is the most persuasive, having not only been deduced through a long series of evaluations and treatments, but also being the most recent examination of claimant available to the Board.

K.S.A. 1997 Supp. 44-510e defines permanent partial general disability as:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

With regard to the nature and extent of injury and/or disability, the Appeals Board must consider the policies set forth by the Kansas Court of Appeals in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). In Foulk, the Kansas Court of Appeals held that the Workers Compensation Act in Kansas should not be construed to award benefits to a worker solely for refusing a proper job that the worker has the ability to perform. In this instance, claimant continued performing her regular duties with minimal accommodation for several years after her traumatic injuries began. This work arrangement ended only after claimant became involved in several verbal altercations with her coworkers and supervisors, was suspended on two separate occasions for misconduct, and was finally fired in June 1998, with her termination having no connection to claimant's work-related injuries.

The Appeals Board finds, in this instance, claimant has failed to prove her entitlement to a permanent partial general disability award under K.S.A. 1997 Supp. 44-510e. Claimant's job loss stems from personal confrontations with claimant's coworkers and supervisors. Therefore, the Appeals Board finds claimant is limited, in this instance, to her functional impairment of 3 percent to the body as a whole. *See* Perez v. IBP, Inc., 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated September 7, 1999, should be, and is hereby, modified, and an award is granted in favor of the claimant, Kathy Polk, and against the respondent, Cessna Aircraft Company, and its insurance carrier, Aetna Casualty & Surety Company, for an injury occurring through June 11, 1998, based upon a 3 percent permanent partial general body disability. Claimant is entitled to 12.45 weeks permanent partial disability at the statutory maximum rate of $351 per week totaling $4,369.95.

As of the date of this Order, the entire award is due and owing in one lump sum minus any amounts previously paid.

Claimant is further entitled to unauthorized medical up to the statutory maximum upon presentation of an itemized statement verifying same.

Claimant is awarded future medical treatment upon application to and approval by the Director of Workers Compensation.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are assessed against the respondent to be paid as follows:

Court Reporting Service	
Deposition of Adelfa Hidalgo	$279.75
Deposition of Jerry D. Hardin, M.S.	Unknown
Hostetler & Associates, Inc.	
Deposition of Daniel D. Zimmerman, M.D.	$170.60
Ireland Court Reporting	
Transcript of regular hearing	$257.00
Deposition of Robert L. Eyster, M.D.	$141.50
Deposition of Karen Crist Terrill	$153.00
Deposition of Bruce Bandhauer	$292.00
Transcript of motion hearing	$ 82.60

IT IS SO ORDERED.

Dated this ____ day of March 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Tamara Jo Collins, Wichita, KS
Edward D. Heath, Jr., Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director